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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARK STEVEN SIMMONS,<br><br>Defendant and Appellant. | H028499<br>(Santa Clara County<br>Super.Ct.No. E9909752) |

By statute California courts may order treatment for some mentally disordered offenders (MDO) beyond the time they would otherwise be released from incarceration for their underlying crimes. One qualification for treatment is that the underlying crime be among those listed or described in Penal Code section 2962, subdivision (e)(2).[1] As this court explained in a prior opinion (*People v. Simmons* (Aug. 25, 2004, H026672) [nonpub. opn.]), defendant Mark Simmons's 1999 convictions of two counts of lewd and lascivious acts upon a 14-year-old female when he was 39 years old (§ 288, subd. (c)(1)) only qualify as treatable crimes if they involved either "force or violence, or caused

[1] Unspecified section references are to the Penal Code. Unspecified subdivision references are to section 2962.

serious bodily injury" (subd. (e)(2)(P)) or an express or implied threat "of force or violence likely to produce substantial physical harm" (subd. (e)(2)(Q)).

Our earlier opinion reversed a prior order for continued treatment because "there was no substantial evidence that defendant's crimes involved 'force' within the meaning of section 2962, subdivision (e)(2)(P)" (*People v. Simmons, supra,* H026672, typed opn. at p. 18) and no "substantial evidence that there was an express or implied threat of 'the use of force or violence likely to produce substantial physical harm.' (§ 2962, subd. (e)(2)(Q).)" (*Id.* at p. 13.) Upon remand, in light of additional evidence, the trial court concluded, "The evidence that I heard today establishes just such type of physical force to the victim, and I am satisfied that it was above and beyond that which was necessary to accomplish the lewd act itself . . . ." After further trial, the court ordered defendant committed to Napa State Hospital for a year of treatment.

The sole issue on appeal is whether substantial evidence supports this conclusion. For the reasons stated below, we will affirm the order of commitment.

TRIAL EVIDENCE

The court's conclusion was premised entirely on the testimony of defendant's victim ("D"), who was 14 at the time of the crimes and 20 at the time of trial. D explained that her mother took defendant in as a boarder about the time D began high school. D was then about five feet two to five inches tall and weighed about 105 pounds. Defendant was larger in height and weight.

Defendant initially just talked to D about wanting to be her first sexual partner. Then, at a time when D was home from school while her mother was at work, defendant physically molested her. As D lay in her bed watching TV, defendant came in, talked to her, and lay down under the covers next to her, naked except for his bathrobe. He pressed against her back, holding onto her shoulders, until she felt his penis. She did not tell him to stop, but she squirmed and push herself away. He stopped for a few minutes and then pulled her closer to him, starting again. He told her not to tell her mother or he

would take her away from her mother. Similar incidents of touching occurred four or five times in D's bedroom. Defendant did not raise his voice talking to her or threaten her or her mother.

On a separate occasion when D was sleeping in her mother's bed, she awakened to find defendant next to her, touching her legs and thighs and between her legs. D pretended to be asleep. After five to ten minutes, defendant got onto the bed and was "more on top of" her. As he kept touching her, she pretended to suddenly wake up and tried to push him off her. "I had to kind of push a little to get my legs out from underneath him." She tried to push him off and said, "please, please." He eventually, not immediately, moved off her and started talking like nothing had happened. He was in physical contact with her for 30 to 40 minutes on this occasion. The molests ended when D told her aunt, who told her mother, and they called the police.

SUFFICIENCY OF THE EVIDENCE

As we explained in our prior opinion, "Appellate review of sufficiency of the evidence questions in MDO proceedings incorporates the criminal conviction standard of review. (*People v. Miller* (1994) 25 Cal.App.4th 913, 920 (*Miller*).) '"'On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" [Citation.]' (*Id.* at p. 919.) On appeal, whether the evidence is sufficient to establish a qualifying crime is ultimately a question of law. (Cf. *People v. Barragan* (2004) 32 Cal.4th 236, 246.)" (*People v. Simmons, supra,* H026672, typed opn. at p. 9.)

We explained that "force" has developed several legal meanings, one in the context of lewd touching (§ 288, subd. (b)(1) & (2); *People v. Cicero* (1984) 157 Cal.App.3d 465, 474), a different one in the context of forcible rape (§ 261, subd. (a)(2); *People v. Griffin* (2004) 33 Cal.4th 1015, 1023), and another in the context of death penalty qualification (§ 190.3; *People v. Raley* (1992) 2 Cal.4th 870, 907). We did not determine whether any of these definitions is congruent with "force" as used in subdivision (e)(2)(P).

So long as one of defendant's crimes involved the requisite force, he qualifies on that ground as an MDO. We focus on the encounter in her mother's bedroom, when defendant had D pinned down by his body weight and did not immediately release her when she tried to push him away and said, "please, please." This same type of conduct, physical imposition, has been found to be force in a lewd touching context (*People v. Stark* (1989) 213 Cal.App.3d 107 (*Stark*)) and also death-qualifying force when employed in a rape (*People v. Jennings* (1988) 46 Cal.3d 963 (*Jennings*)). *Stark* involved "an adult male lying on top of a nine-year-old boy, who was rendered unable to move away because of the weight of the adult on top of him. The adult ignored the boy's request to get off of him and to stop fondling him. The molestation only stopped when the boy kicked the adult six times in the stomach." (*Stark*, *supra*, 213 Cal.App.3d at p. 112.) In *Jennings*, the court found force based on evidence "that he lay down on the couch next to her, placed her on her back, and then lay on top of her to accomplish the act." (*Jennings*, *supra*, 46 Cal.3d at pp. 982-983.) We conclude that this conduct, lying on top of the victim and continuing to touch her while ignoring her attempts to push him away, amounts to substantial evidence of "force" within the meaning of subdivision (e)(2)(P).

Defendant asserts that his conduct differs from the force this court found in *People v. Bolander* (1994) 23 Cal.App.4th 155. In that case the defendant inhibited a nine-year-old boy from pulling his shorts up, bent him over, and pulled the victim towards him to

accomplish sodomy. (*Id.* at p. 159.) He also contrasts *People v. Valdez* (2001) 89 Cal.App.4th 1013, which found force when a defendant "physically restrained a small child too young to resist and touched her vaginal area for several minutes despite the presence of other family members." (*Id.* at p. 1017.) The restraint involved lifting a five-year-old niece onto his lap and holding her. (*Id.* at p. 1016.) While all these acts differ, we see no conceptual difference in restraining a smaller victim by physical grasp or by sheer body mass. In both cases the victim's physical resistance to sexual contact is overcome by physical force.

In view of this conclusion we do not consider the People's argument, not made in the trial court, that there was substantial evidence of an implied threat of force or violence likely to produce substantial risk of harm.

DISPOSITION

The order of commitment is affirmed.

Duffy, J.

WE CONCUR:

Premo, Acting, P.J.

Bamattre-Manoukian, J.